Supreme Court, U.S.
FILED
APR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-573

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-573

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY LEE TAYLOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent acknowledges that if a district court finds a violation of the 70-day time limit under the Speedy Trial Act, it must apply a balancing approach to determine whether the circumstances of the case, considered together, are sufficiently aggravated to warrant dismissal of the indictment with prejudice. 18 U.S.C. 3162(a)(2). And respondent does not disagree with our submission (Gov't Br. 26) and the conclusion by both courts below (Pet. App. 17a, 30a) that the first of the statutorily specified factors, "the seriousness of the offense" (18 U.S.C. 3162(a)(2)), weighs against dismissal with prejudice in this case.[1] But respondent does take issue with our position regarding the other factors that must be taken into account.

Significantly, respondent does not dispute our submission that *if* the other factors we have addressed in our opening brief are included in the balancing process, they

[1] Respondent was charged with possession of cocaine with intent to distribute it (in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)) and conspiring to possess cocaine with intent to distribute (in violation of 21 U.S.C. 846). E.R. 1-2.

(like the seriousness of the offense) weigh heavily against dismissal of the indictment with prejudice. Thus, respondent does not dispute that the 14-day excess found by the courts below was minimal (Gov't Br. 26-27);[2] that he was not prejudiced by the passage of those 14 days (*id.* at 27, 29-30); that the delay was not attributable to any knowing violation or intentional misconduct by the government (*id.* at 27, 32); and that he was responsible for precipitating the possibility of a Speedy Trial Act violation by failing to appear for trial on November 19, 1984, within the 70-day period (*id.* at 27-28). Instead, respondent contends that those factors may be altogether excluded from the balancing process under 18 U.S.C. 3162(a)(2). With those factors put to one side, respondent then argues that what he terms the "lackadaisical" manner in which the government returned him to Washington after he was apprehended in California, considered in isolation, justified dismissal of the indictment with prejudice.

The Speedy Trial Act does not permit so narrow an inquiry into a question of such fundamental importance to the administration of justice and the protection of society as whether the government will be forever barred from prosecuting serious charges against the accused. Section 3162(a)(2) provides (emphasis added):

> In determining whether to dismiss the case with or without prejudice, the court *shall consider, among others, each of the following factors*: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.

---

[2] Contrary to respondent's assertion (Br. 30), we merely assume arguendo—we do not concede—that there was actually a violation of the Speedy Trial Act in this case. See Gov't Br. 5-6, 23-24 & nn. 4, 13.

This provision on its face mandates an inquiry into *all* the "facts and circumstances" of the particular case, as well as broader questions concerning the administration of the Speedy Trial Act and the criminal justice system as a whole, and any "other[]" factors that reasonably should inform the court's judgment. All of these factors must be considered in aid of the ultimate determination whether—after the considerations weighing against dismissal with prejudice are offset against those that weigh in favor—the net circumstances of the case are so aggravated that dismissal with prejudice is a proper sanction. When the various factors in this case are fully considered in this manner, it is clear that the courts below erred in barring a reprosecution of respondent.

2.a. Although respondent agrees that the length of delay is pertinent in determining whether an indictment should be dismissed with prejudice because of a violation of the Speedy Trial Clause of the Sixth Amendment (Resp. Br. 14, citing *Barker* v. *Wingo*, 407 U.S. 514, 531-533 (1972)), he argues (Resp. Br. 14-18) that the length of the delay should play no part in determining whether an indictment should be dismissed with prejudice where the time limits of the Speedy Trial Act have been exceeded. However, because the Speedy Trial Act was passed in part to protect the defendant's Sixth Amendment right to a speedy trial (see *United States* v. *Rojas-Contreras*, 474 U.S. 231, 238 (1985) (Blackmun, J., concurring), quoting H.R. Rep. 96-390, 96th Cong., 1st Sess. 3 (1979); S. Rep. 93-1021, 93d Cong., 2d Sess. 1 (1974)), it should not lightly be presumed that Congress would altogether exclude from consideration under the Act any of the factors that are relevant to the Sixth Amendment inquiry. And an analysis of the Act demonstrates that Congress did not do so.

In support of his argument that a court may ignore the length of the delay, respondent relies on the fact that the Speedy Trial Act, unlike the Sixth Amendment and this Court's decisions arising under it, establishes a specific and absolute time limit (subject to specified exclusions) within which a trial is to be commenced. Resp. Br. 16, 17-18. Respondent, however, misses the significance of the time limit. It simply defines when a violation of the Act has occurred: whether the 70-day limit has been exceeded by 23 months (as in *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986)), by 14 days (as the courts below found in this case), or by even one day, the Act has been violated and indictment must be dismissed. 18 U.S.C. 3162(a)(2).

Congress did not, however, inflexibly direct that any such dismissal must be with prejudice, irrespective of the extent to which the 70-day limit was exceeded. Congress directed the court to make a further and distinct determination of whether the defendant may be reprosecuted, notwithstanding the fact the 70-day limit was violated. Moreover, Congress directed the court in making that determination to consider, inter alia, "the facts and circumstances of the case that led to the dismissal." 18 U.S.C. 3162(a)(2). The period of time in excess of the statutory 70-day limit is of course the most significant "fact" or "circumstance" that leads to the dismissal of *any* case under the Speedy Trial Act. Section 3162(a)(2) therefore clearly contemplates that a district court will consider the period of delay, and it is obvious that the most severe sanction (dismissal with prejudice, without possibility of reprosecution) should be reserved for the most egregious violations. Compare *Shepard* v. *NLRB*, 459 U.S. 344, 350 (1983). For example, although a 23-month overage would weigh heavily in favor of dismissal with prejudice (see *United States* v. *Stayton, supra*), a one-day overage would tip the scale with equal

force in the opposite direction. Consistent with this view, the courts of appeals have uniformly considered the length of the delay in determining the appropriate remedy for a statutory speedy trial violation.[3] Because the delay in this case was minimal, that factor plainly weighs against dismissal with prejudice.[4]

b. For similar reasons, respondent errs in contending (Br. 6-7) that his flight from Washington on the day of trial "is simply not relevant to the present analysis" and is "beside the point." Respondent relies (Br. 7-8, 20-21) on statutory provisions and legislative history pertaining to the calculation of excludable delay due to the transportation of prisoners, removal hearings, and a defendant's absence from the charging district. See 18 U.S.C. 3161(h)(1)(G) and (H) and 3161(h)(3)(A).[5] But once again,

---

[3] See, *e.g.*, *United States* v. *Melguizo*, 824 F.2d 370, 372 (5th Cir. 1987), petition for cert. pending, No. 87-551; *United States* v. *Stayton*, 791 F.2d 17, 21-22 (2d Cir. 1986); *United States* v. *Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir. 1986), cert. denied, No. 86-5229 (Nov. 17, 1986); *United States* v. *Simmons*, 786 F.2d 479, 485 (1986), vacated on other grounds, 812 F.2d 818, 819 (2d Cir. 1987); *United States* v. *Phillips*, 775 F.2d 1454, 1455-1456 (11th Cir. 1985); *United States* v. *Brown*, 770 F.2d 241, 244 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Russo*, 741 F.2d 1264, 1267 (11th Cir. 1984); *United States* v. *Hawthorne*, 705 F.2d 258, 260-261 (7th Cir. 1983); *United States* v. *Carreon*, 626 F.2d 528, 533-534 (7th Cir. 1980).

[4] The court of appeals, unlike respondent, did not regard the length of the delay as irrelevant. It expressed the view that the 14-day delay, "although not wholly insubstantial, was not so great as to mandate dismissal with prejudice" (Pet. App. 16a-17a).

[5] Respondent also relies (Br. 8 n.6) on the fact that Congress did not adopt a proposal by the Department of Justice that would have started a new 70-day period following the capture of a defendant who fled prior to trial, and elected instead to exclude delay caused by flight from the original 70-day period. See generally A. Partridge,

the statutory provisions and legislative history upon which respondent relies go to the question of whether the time limits in the Act were violated; they do not address the distinct question of remedy.

There is nothing in the text or legislative history of the Act that manifests any intention by Congress to exclude from the balancing test set forth in Section 3162(a)(2) the effect of a defendant's flight. To the contrary, respondent's flight was one of the "facts and circumstances of the case that led to the dismissal." 18 U.S.C. 3162(a)(2). Indeed, it was a "but for" cause of the dismissal: if respondent had appeared for trial on the scheduled date within the 70-day period, there would have been no Speedy Trial Act violation. The fact that respondent was subsequently apprehended in California, and that the courts below found that the government took somewhat longer than it might have in returning him to Washington for trial, does not somehow absolve respondent of his responsibility for precipitating the occasion for a Speedy Trial Act violation in the first place.

Respondent's flight also is made relevant by the remaining factors listed in 18 U.S.C. 3162(a)(2): "the impact of a reprosecution on the administration of [the Act] and on the administration of justice." By deliberately failing to appear for a trial that was scheduled to comply with the 70-day time limit under the Speedy Trial Act, respondent deliberately flouted the Act and one of its underlying purposes: to promote the public interest in the prompt disposition of criminal charges. Respondent's flight also undermined respect for the courts, and it interfered with the sound administration of justice by imposing burdens on the government in rescheduling a separate trial of

---

Legislative History of Title I of the Speedy Trial Act of 1974, at 118-125 (Fed. Judicial Center 1980).

respondent's co-defendants, as well as respondent's own trial. See Gov't Br. 29-30.[6] Permitting a reprosecution of respondent in these circumstances would have a positive impact on the administration of the Speedy Trial Act by demonstrating that the intentional disregarding of its provisions for a tactical advantage will not be countenanced; and permitting a reprosecution would have a positive impact on the administration of justice generally by serving to deter serious interruptions of the sort perpetrated by respondent.

More broadly, the sanction provision of the Speedy Trial Act requires the district court to assess the relative equities in order to determine whether, on balance, they weigh so strongly in favor of the defendant that reprosecution should be barred and the defendant given complete immunity for his crimes. Here, the period of delay between respondent's failure to appear for trial and the date on which he was apprehended (75 days) far exceeded the brief period of non-excludable delay (14 days at most) that was attributable to the Marshals Service in returning him to Washington from the place to which he had fled. In

---

[6] The text and legislative history of the Speedy Trial Act recognize that the policies of the Act are served by joint trials, because they promote economy and eliminate duplication in the disposition of criminal charges, and thereby facilitate the speedy trial of criminal charges generally. See 18 U.S.C. 3161(h)(7) (excluding "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted"); S. Rep. 96-212, 96th Cong., 1st Sess. 24-25 (1979); *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 255, 258 (1971); *United States* v. *Tobin*, No. 87-5004 (11th Cir. Mar. 23, 1988), slip op. 2146-2147.

addition, respondent's flight dramatically altered the risks for the government, because it deprived the government of the absolute assurance that there would be no violation of the Act if the trial was held as scheduled on November 19, 1984, and instead created a situation in which even the briefest period of non-excludable delay would lead to dismissal of the indictment.

c. Contrary to respondent's contention (Br. 9-14), the absence of any prejudice to him as a result of the brief 14-day period of non-excludable delay plainly is a relevant factor on the question of remedy. Although "prejudice" is not specifically mentioned in Section 3162(a)(2), it is one of the principal considerations to be taken into account by the district court in assessing the "impact of a reprosecution * * * on the administration of justice." Certainly, for example, the administration of justice would be adversely affected if a defendant's ability to defend against the reinstituted charges has been impaired by unnecessary delay; conversely, if the defendant's ability to defend against the charges is unimpaired, the administration of justice would not be adversely affected to any significant extent if he is subject to reprosecution notwithstanding a relatively brief delay beyond the 70-day limit.[7] In fact, the court of appeals, unlike respondent, recognized the relevance of prejudice to the defendant, because it acknowledged that "there is no indication that the delay

[7] Respondent correctly points out (Br. 11, 14) that during the 1974 House debates, Representative Dennis asked whether "the phrase, 'the facts and circumstances of the case which led to the dismissal' [is] broad enough to include the degree of prejudice to the defendant's ability to prepare his case." 120 Cong. Rec. 41795 (1974). In response to this inquiry, Rep. Conyers agreed that it is (*ibid.*). In light of this legislative history, respondent argues (Br. 8-9) that to the extent that prejudice is relevant, it should be included in this second factor. In our view, prejudice is more logically considered as part of the inquiry into the effect of the violation on the administration of justice. See 120 Cong. Rec. 41794 (1974) (remarks of Rep. Cohen). Ultimately, however, it does not matter under which rubric the presence or absence of prejudice is considered. Indeed, the fact that different Members of Congress regarded the possibility of prejudice to the defendant as relevant under each heading—the facts and circumstances of the case, and the impact on the administration of justice—serves to underscore the inescapable relevance of prejudice in the speedy trial setting.

would have prejudiced [respondent] in preparing for trial" (Pet. App. 17a).[8]

The legislative history discussed in our opening brief (at 19) clearly manifests Congress's intention that the presence or absence of prejudice be weighed in the balance. The legislative history upon which respondent relies (Br. 11-14) merely reflects the concern of Representative Cohen that a showing of prejudice to the defendant should not be an absolute prerequisite in every case to dismissal of the indictment with prejudice. See 120 Cong. Rec. 41778, 41794-41795 (1974) (remarks of Rep. Cohen); *id.* at 41795 (remarks of Rep. Conyers). We do not contend otherwise here. In some cases, other considerations, such as a very prolonged period of delay, or intentional manipulation by the government to obtain a tactical advantage, might render the circumstances of the case sufficiently aggravated to justify dismissal with prejudice even in the absence of identifiable prejudice to the defendant. No Member of Congress, however, expressed the view that the

[8] The court of appeals did express the view that respondent was prejudiced by being incarcerated during the entire period (Pet. App. 17a). However, as we have explained in our opening brief (at 30), and as respondent does not dispute, he was in custody during that period on the bench warrant for failure to appear for trial on November 19, 1984, for which there was no Speedy Trial Act violation.

presence or absence of prejudice to the defendant is irrelevant to the determination of the appropriate dismissal sanction, or that the issue of prejudice should be altogether ignored by the district court, as respondent urges.

d. Finally, in contrast to respondent's deliberate disregard of the Act's provisions, the government's actions were, as respondent concedes, "not motivated by evil intentions" (Resp. Br. 8). Where the violation is inadvertent or unintentional and not motivated by any desire to delay the trial or to obtain a tactical advantage, considerations of the administration of the Speedy Trial Act and of the criminal justice system generally do not weigh in favor of the severe sanction of dismissal of the indictment with prejudice. See *United States* v. *Miranda*, 835 F.2d 830, 834-835 (11th Cir. 1988); *United States* v. *Melguizo*, 824 F.2d at 371-372; *United States* v. *Simmons*, 786 F.2d at 484-485.

Respondent relies (Br. 3, 5, 7, 18, 22) on what the courts below characterized as the "lackadaisical" manner in which the Marshals Service returned respondent to Washington after he was apprehended in California, following his escape. However, as Judge Poole explained in his concurring and dissenting opinion below (Pet. App. 19a-22a), dismissal with prejudice was an "unduly harsh" (*id.* at 21a) overreaction. For example, the courts below held that there were six days of non-excludable delay because respondent was not immediately returned to state custody on February 22, 1984 (*id.* at 12a, 28a). However, as we explained in our opening brief (at 24-25), that period was improperly included, because the Marshal was under no obligation to return respondent to Washington while state charges were pending. Moreover, as Judge Poole pointed out, because the state authorities could have obtained custody of respondent—and therefore interrupted

federal custody of him—at any time between February 22 and February 28, "the government cannot be found 'lackadaisical' or irresponsible in not immediately having taken advantage of these few days of [respondent's] presence to begin proceedings against him" (Pet. App. 20a-21a (citation omitted)). And if the Marshal had returned respondent to state custody on February 22, as respondent insists he should have, then the time that respondent remained in state custody until the state charges were dismissed on February 28, 1984 clearly would have been excluded. In short, respondent was not adversely affected by being in federal rather than state custody during that period.

The next period of non-excludable delay charged to the government was the five-day period from March 1, 1984, when the Marshals Service was notified that the state charges against respondent had been dismissed, and March 5, 1984, the day before he was brought before a magistrate to begin removal proceedings. See Pet. App. 12a-13a & n.9, 28a). However, as Judge Poole again pointed out (*id.* at 21a), March 1, 1984 was a Friday, and the record does not show at what time of day the Marshals Service received notice that the state charges had been dropped (see E.R. 51); especially if the notification was received late in the day, it is understandable that respondent's appearance would be put over to the week beginning March 4, 1984. When respondent was brought before the magistrate on March 6, the attorney who was temporarily representing respondent requested that the matter be put over until Friday of that week (March 8, 1984) because Mr. Loveseth, respondent's regular counsel in the case, was unavailable (E.R. 75, 80-81). On March 8, Mr. Loveseth suggested that the magistrate schedule a removal hearing for a later date (E.R. 85). Counsel indicated that

he did not anticipate that a removal hearing would actually be necessary, but he stated that he "would rather keep [respondent] here [in California] and organize what is gonna happen and talk to [the Assistant United States Attorney] up in Seattle" (*ibid.*); he therefore agreed to a continuance to March 18, 1984 (E.R. 86). Then, again at counsel's request, the hearing was scheduled for April 3, 1984 (E.R. 89). On that date, respondent waived his right to a hearing, and the magistrate ordered that he be returned to Washington (E.R. 52). Especially in light of respondent's willingness to remain in California for almost a month after he was first brought before a magistrate there, the brief delay in scheduling that first appearance, assuming it was unreasonable at all under Fed. R. Crim. P. 40(e), plainly did not warrant dismissal of the indictment with prejudice.

The final period of non-excludable delay was the four-day period in excess of the 10 days that the courts found reasonable under 18 U.S.C. 3161(h)(1)(H) for transporting respondent to Washington after the magistrate entered the order of removal (Pet. App. 14a, 28a-29a). But the government submitted an affidavit explaining that this period was attributable to the Marshal's assembling of several prisoners for transportation purposes (E.R. 52-53), "in order to effect economy of expenses" (Pet. App. 21a-22a) (Poole, J., concurring and dissenting)). Even if that period was non-excludable under 18 U.S.C. 3161(h)(1)(H), it did not substantially undermine the policies of the Speedy Trial Act.

e. In sum, none of the 14 days of delay found by the courts below "was of such studied, deliberate, and callous nature as to justify dismissal with prejudice" (Pet. App. 22a (Poole, J., concurring and dissenting)). Because the other factors in this case weigh heavily against dismissal

with prejudice, the district court clearly erred in ordering that severe sanction.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/80402